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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 283.

BALTIMORE NATIONAL BANK,
Petitioner,

v.

STATE TAX COMMISSION OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF ON BEHALF OF PETITIONER.

EDWIN F. A. MORGAN,
GAYLORD LEE CLARK,
Solicitors for Petitioner,
Baltimore National Bank.

The Daily Record Co., Print, Baltimore.

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TEXTS.

First & Second Banks of the United States by Holdsworth & Dewey—

Senate Docket No. 571, 61st Congress, 2nd Session 15, 16

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF ON BEHALF OF PETITIONER.

The opinion of the Court of Appeals of Maryland in the case of State Tax Commission of Maryland v. Baltimore National Bank is reported in 180 Atl. 260; and also in the Record at page 25.

STATEMENT OF THE CASE.

This case is in this Court on writ of certiorari to the Court of Appeals of the State of Maryland granted by this Court on the 14th day of October, 1935, pursuant to Section 237(c) of the Judicial Code; U.S.C.A. 28 Sec. 344(c) (R. 43).

The sole question for this Court's consideration is whether a State (Maryland) may tax certain shares of stock of a national bank (Baltimore National Bank), where Reconstruction Finance Corporation is the owner of such shares. This involves consideration of Rev. Stat. Sec. 5219 plus the fact that the shares are the property of the United States held for it in this case by Reconstruction Finance Corporation.

The Petitioner, Baltimore National Bank, conducts a general banking business at Baltimore, Maryland, and was incorporated on August 4, 1933, under the National Banking Act, pursuant to a plan of reorganization of The Baltimore Trust Company, which was not able to resume business after the bank holiday of February 24th to March 4th, 1933, and which is in the course of liquidation (R. 25). Baltimore National Bank was formed with the aid of the subscription by Reconstruction Finance Corporation to an issue of preferred stock, Act of Congress January 22, 1932; 47 Stat. 5; U.S.C.A. Title 15, Sections 601, etc. The issue was of ten thousand (10,000) shares of 5% Cumulative Preferred Stock of the par value of $100.00 each, and all of such stock was subscribed and paid for and continuously held by Reconstruction Finance Corporation. These shares were assessed by the State Tax Commission of Maryland at their par value (R. 22, 26).

Pursuant to the provisions of the Acts of Maryland of 1929, Chapter 226, Section 186(a), being Section 186(a) of Article 81 of Bagby's Annotated Code of Maryland, 1929 Supplement, page 548, Baltimore National Bank appealed to the Circuit Court of Baltimore City from said assessment made by the State Tax Commission of Maryland (R. 1).

The Circuit Court of Baltimore City reversed the ruling of the State Tax Commission (R. 23, 24), and the Commission appealed to the Court of Appeals of Maryland pursuant to the provisions of Article 81, Section 186(b) of the Annotated Code of Maryland, 1929 Supplement, pages 546 and 547 (R. 24). The Court of Appeals of Maryland on June 18, 1935 filed its opinion, reversing the Circuit Court of Baltimore City and reinstating the decision of the State Tax Commission of Maryland (R. 35 and 36).

From the decision of the Court of Appeals of Maryland Baltimore National Bank obtained from this Court a writ of certiorari (R. 43). The facts in this case are not in dispute, having been presented to the Circuit Court of Baltimore City upon stipulation (R. 22 and 23).

The Court of Appeals of Maryland rejected the State Tax Commission's contention that the Reconstruction Finance Corporation should have been a party and held that there was no want of necessary parties and that the proceedings were in due form and the question properly before the Court (R. 26). This is, of course, a question of local law upon which the decision of the highest court of the State is conclusive.

The sole question is one of law and in its most precise form is whether a state may tax shares of stock

of a national bank where such shares are the property of Reconstruction Finance Corporation.

This question has been answered in the negative by:

U. S., et al., v. Lewis, 10 Fed. Supp. 471, decided by a three-judge court in the District Court of the United States for the Western District of Kentucky.

In Re Opinion of the Justices, 177 Atl. 897, decided by the Supreme Judicial Court of the State of Maine.

It has been answered in the affirmative by:

State Tax Commission of Maryland v. Baltimore National Bank, 180 Atl. 260, the case at bar, decided by the Court of Appeals of the State of Maryland.

SPECIFICATIONS OF POINTS TO BE ARGUED.

All the contentions enumerated in the Assignment of Errors (R. 38, 39 and 40) and as more specifically subdivided as to subject matter in the Summary of Argument will be argued by counsel for the Baltimore National Bank. Briefly, it is our contention that the Court of Appeals of Maryland was in error in sustaining the assessment by the State Tax Commission of Maryland of the preferred stock of Baltimore National Bank, all of which stock was and is owned by the Reconstruction Finance Corporation, an arm or department of the Federal Government, for the following reasons: (1) That such a tax is in violation of the restrictions implied in the Federal Constitution as decided in the case of McCulloch v. Maryland; (2) because of the specific prohibition in the Reconstruction Finance Corporation Act itself which ex-

empts the capital, surplus, etc. of Reconstruction Finance Corporation from taxation and (3) because, though the National Banking Act permits taxation by the States of stock of a national bank, it does so only when it is done in strict conformity with the Act, and the Act does not specifically or by implication authorize the taxation of such national bank stock when the owner thereof is the Federal Government or an arm or department thereof.

SUMMARY OF ARGUMENT.

I. No State may tax the property or instrumentalities of the United States.

A. Property may be acquired and held either by the Government directly or through an arm or department thereof, or even by a mere agency.

B. The Reconstruction Finance Corporation is an arm or department of the Federal Government and is an appropriate instrumentality to acquire property for and on behalf of the Federal Government.

C. The acquisition and holding of shares of stock of a National Bank by the United States is a governmental function.

D. The tax here asserted, directly burdens the exercise of a governmental function of the United States.

II. The pertinent statutes of the United States assert and do not waive the immunity of the Federal Government from taxation by the States.

1. The National Bank Act.

2. The Reconstruction Finance Corporation Act.

III. Conclusion.

ARGUMENT.

I.

NO STATE MAY TAX THE PROPERTY OR INSTRUMENTALITIES OF THE UNITED STATES.

It is too clear for argument that the property and instrumentalities of the United States are not subject to taxation by the states.

McCulloch v. Maryland, 4 Wheat. 316
Osborn v. U. S. Bank, 9 Wheat. 738
Van Brocklin v. Tennessee, 117 U. S. 151.

The Attorney General of Maryland admitted this as a general proposition of law in his opinion to the State Tax Commission of Maryland (R. 13), admitted it in his argument before the Court of Appeals of Maryland and will no doubt admit it in this Court.

Maryland is one of 35 States adhering to the original method, enacted in 1864, of Rev. Stat. Sec. 5219, of taxing, to the owners thereof, shares of stock of national banks, known as the "share method" or the "original method" and the bank is merely the agent of the stockholder to pay or to contest the tax as if it were the ultimate taxpayer. *Schuylkill Trust Company v. Commonwealth of Pennsylvania,* No. 3, October Term 1935, decided Nov. 11, 1935.

The tax is sought to be imposed on shares of national bank stock in this case pursuant to the following statutes of Maryland, namely:

> Section 6 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 6 (6), page 478, reads as follows:

"6. The following property * * * shall be subject to assessment to the owner and taxation for ordinary taxes in this State and in the county and/or city specified below:

(6) All shares of stock in any national bank situated in this State, in the county and/or city where the holders thereof respectively reside, or if they be non-residents of this State, in the county and/or city in which the principal office of such bank is situated."

Section 10 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 10, sub-section (b) (1), page 484, reads as follows:

"The following shall be valued and assessed for the purposes of State, county and/or city taxation by the State Tax Commission; (1) shares of stock subject to taxation under this Article in any national bank located in this State * * *."

Section 15 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 15 (e), page 486, reads as follows:

"(e) Shares of stock assessable under this Section shall be taxed to the several owners thereof, and the taxes thereon shall be debts of such owners, but may be collected in each case from the bank * * *, which shall be bound to pay the same for account of its stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer, but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise."

This tax is not a tax upon the bank. It is a tax upon the owner of the shares of stock of the bank. *Minnesota*

v. First National Bank, 273 U. S. 561, 564. It could not be a tax against the bank, for the bank is a federal agency, and a tax against it would be a tax upon its operations and would be accordingly in violation of the principles of *McCulloch v. Maryland,* supra, and the National Bank Act, which will be later referred to.

It is therefore our contention that such tax is invalid both because it is a tax upon the operations of the Reconstruction Finance Corporation, which is much more than a mere federal agency, and because it is a tax upon property owned by the Federal Government, namely the shares of national bank stock, and held for it by Reconstruction Finance Corporation, one of its arms or departments. If either of these contentions is correct, the tax is unconstitutional.

A.

Property May Be Acquired and Held Either by the Government Directly or Through an Arm or Department Thereof, or Even by a Mere Agency.

It will not, we presume, be disputed that the Army, Navy, Post Office, Treasury and other executive departments, as well as the legislative and judicial branches of the Government, acquire and hold for the Government vast amounts of property. This property is Government property, is for Government uses and no one questions that it is exempt from all taxation.

So also there have been from the earliest day of the Republic to this day corporations formed by the Government to hold vast amounts of governmental properties. The legal title to such properties may be in such corporations, but the equitable title is in the Federal Government and the officers of such corporations are ac-

countable to the Federal Government exactly as are the officials of any department of the Government.

An early example of such was a corporation formed by Congress to take over the Federal territory. This was done pursuant to the power "to make all needful rules and regulations respecting the territory or other property belonging to the United States", as provided in the Third Section of the Fourth Article of the Constitution. Chief Justice Marshall in *McCulloch v. Maryland,* supra, at page 422, said: "Yet all admit the constitutionality of a territorial government, which is a body corporate."

The Emergency Fleet Corporation, The Spruce Corporation and the United States Housing Corporation, among others, all held property for the Federal Government.

See:

Clallam County v. United States, 263 U. S. 341;

Olson v. U. S. Spruce Corporation, 267 U. S. 462;

Emergency Fleet Corporation v. Western Union, 275 U. S. 415;

New Brunswick v. United States, 276 U. S. 547;

Merchant Fleet Corporation v. Harwood, 281 U. S. 519.

It is said by the Court of Appeals of Maryland (R. 33), however, that such corporations were created and property acquired by them pursuant to the exercise of the war powers by the Federal Government. This is true, but it does not alter the fact that property may be held by the

Federal Government itself through its officials or departments or through a corporation for the Government. It is in each instance for Congress to decide how such property may best be held and used to meet the end required in the exercise of a governmental function. As Justice Holmes said in the *Clallam County* case, supra, "The incorporation and formal erection of a new personalty was only for the convenience of the United States to carry out its ends."

In *McCulloch v. Maryland*, supra, Chief Justice Marshall said at page 409:

> "It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation."

This contention was rejected by the Court.

Therefore, property may be held either directly by the Government or for the Government through some entity, as Congress may decide, and the next question is whether Reconstruction Finance Corporation is an appropriate entity.

B.

The Reconstruction Finance Corporation Is an Arm or Department of the Federal Government and Is an Appropriate Instrumentality to Acquire Property for and on Behalf of the Federal Government.

The District Court of the United States for the Western District of Kentucky in the case of *United States of America and Reconstruction Finance Corporation v. Lewis et al, members of the State Tax Commission of Kentucky, et al*, 10 Fed. Supp. 471, in a per curiam opinion by Moorman, Circuit Judge, and Anderson and Dawson, District Judges, said, in giving an outline of the Reconstruction Finance Corporation, at page 474—

> "The corporation was created by an Act of Congress. Its entire capital stock was subscribed for and is now owned by the United States. Its affairs are managed by a board of directors, consisting of the Secretary of the Treasury (or, in his absence, the Under-Secretary of the Treasury) and six other members, appointed by the President by and with the advice and consent of the Senate. The corporation has the same franking privilege for its mail as have the various executive departments of the United States Government. It has the right, with the consent of any board, commissioner, independent establishment or executive department of the United States Government, to avail itself, free of charge, of any information, services, facilities, officers and employees of such boards, commissions and executive departments. It is authorized, with the approval of the Secretary of the Treasury, to issue, under certain restrictions, its negotiable obligations, which are fully and unconditionally guaranteed, both as to interest and principal, by the United States, such guaranty to be expressed in the face of such obligations; and the law further provides that, in event of default the payment of these obligations either as to principal or interest, the Secretary of the Treasury

shall pay the amount thereof out of any money in the Treasury not otherwise appropriated. It is authorized to act as a depositary of public moneys, other than receipts from customs, when designated for that purpose by the Secretary of the Treasury, and may also be employed as financial agent of the Government; and it is required to perform all such reasonable duties as depositary of public money and as financial agent of the Government as may be required of it. Provision is made for its liquidation, and all balances remaining unexpended after payment of its debts upon liquidation are to be paid into the United States Treasury as miscellaneous receipts. In event liquidation shall not have been accomplished by the directors within the time fixed by the statute, the Secretary of the Treasury is authorized to take charge of the affairs of the corporation and complete the liquidation thereof; and the corporation is required to make quarterly reports of its operations to Congress."

Even the Court of Appeals of Maryland in the instant case summarized the Reconstruction Finance Corporation as follows:

"The Finance Corporation, the owner of the stock in this instance, is an agency of governmental origin, one which has a close relationship to the National Government as its agency for carrying out the broad purpose of upholding the industries of the country during the depression. The United States owns all its stock. The Secretary of the Treasury is a member of the board of directors, the corporation has the mailing privileges possessed by executive and other departments, and commands the aid of departments and government employees generally. Negotiable obligations which it may issue are guaranteed by the United States. *It may act as a depositary of public moneys or as a financial agent of the government.* It is required to make periodical reports to Congress. Its purpose, and its existence are tempo-

rary; it is eventually to be liquidated by its directors or, if liquidation should be delayed beyond the term of its existence, then by the Secretary of the Treasury" (R. 30). (Italics ours.)

Judge Joseph N. Ulman, the Chancellor in the instant case in the Circuit Court of Baltimore City, said:

"The ground of the distinction relied upon by the Court (Circuit Court of Baltimore City) is that Reconstruction Finance Corporation *is not merely an agency* of the Federal Government in the sense that every national bank is such an agency, but said Reconstruction Finance Corporation is par excellence and a fortiori a governmental agency or perhaps might be designated as an emergency department or arm of the Federal Government." (Italics ours.) (R. 23.)

In the Lewis case the Court said at page 474—

"There is no doubt whatever that all the property of the Reconstruction Finance Corporation is in reality the property of the United States Government, and that all the activities of that Corporation are just as much activities of the Government as if they were conducted by the Secretary of the Treasury in his official capacity, or by some other governmental official."

"If the Act of Congress, instead of creating the Reconstruction Finance Corporation, had created an executive office and provided for the appointment of a natural person to fill the same, and had invested such officer with the powers conferred upon the Reconstruction Finance Corporation, no one would question the proposition that such officer was an agent of the United States Government and that all the property which he held was the property of the United States; and this is none the less true because Congress has seen fit to use a corporation instead of a natural person."

The formation of the Reconstruction Finance Corporation was, in the judgment of Congress, requisite for the fiscal operations of the Government. It is only necessary to recall that the March 1933 income tax payments were postponed due to the failure and closing of the banks. The enactment of the Reconstruction Finance Corporation Act (though a year prior to that event) being an appropriate measure for a needed public purpose, it is not within the authority of the Courts to question the conclusion reached by the legislative branch of the Government. *Smith v. Kansas City Title Company,* 255 U. S. 180.

Accordingly, it having been demonstrated first that property may be held by a corporation for the Federal Government with exactly the same effect as though such property were held by the Federal Government itself; and secondly, that the Reconstruction Finance Corporation is not only an appropriate instrumentality to hold property for the Federal Government, but is, in reality, an arm or department of the Federal Government, then the next question is whether the Federal Government may acquire, hold and own shares of stock of a national bank.

C.

THE ACQUISITION AND HOLDING OF SHARES OF STOCK OF A NATIONAL BANK BY THE UNITED STATES IS A GOVERNMENTAL FUNCTION.

The argument under this heading is limited to whether or not the Federal government is exercising a governmental function when it acquires shares of stock of a national bank, and is not directed to the means by which the Federal government may make such acquisition. The latter has been considered under a previous heading in this brief.

That the holding by the Government of shares of stock of national banks is a governmental function may be shown by reference to what has been done in the past, the language of this Court as to the powers of the Government with respect to national banks, and by distinguishing the instant case from cases where the states have engaged in functions which were non-governmental.

It is no novel venture for the United States to acquire a part of the capital stock of a national bank.

In 1791 the Bank of the United States was established. Its charter provided for its location at Philadelphia, with a capital of $10,000,000, divided into 25,000 shares of $400 each. One-fourth of all subscriptions, private and corporate, was to be paid in specie, and three-fourths in United States stock bearing six percent interest, payable in four equal semi-annual payments. The President of the United States was authorized to subscribe, on behalf of the United States, $2,000,000, a loan of equal amount to be made by the bank, which was to be reimbursed in ten equal annual instalments. No subscription other than that of the Government was to exceed 1,000 shares. See: *First and Second Banks of the United States,* by Holdsworth and Dewey; being Senate Docket No. 571 of the 61st Congress, Second Session, printed by the Government Printing Office in 1910 for the National Monetary Commission, p. 19.

At about the time the Bank's charter would expire, which was in 1811, Gallatin, then Secretary of the Treasury, said, with respect to the constitutionality of the Bank: "The Bank charter having, for a number of years, been acted upon, or acquiesced in, as if constitutional, by all the constituted authorities of the nation, and

thinking, myself, the use of the banks to be at present necessary for the exercise of the legitimate powers of the general Government, the continuation of a Bank of the United States has not, in the view which I have been able to take of the subject, appeared to me to be unconstitutional." Ibid. p. 82.

With respect to the debates in Congress on the proposal to recharter the Bank, Mr. Holdsworth said that one of the two chief questions then arising was that of the constitutionality of the Bank, and then said: "For twenty years the Bank had received the countenance and patronage of the Government which originally owned two-fifths of its capital. It had received the repeated sanction from the different administrations, and especially from Jefferson and the democratic party, by authorizing the establishment of a branch at New Orleans and selling a million of the Government stock to British subjects at a profit of $400,000." Ibid. p. 90.

The Second Bank of the United States was chartered in 1816 for twenty years. Its capital was $35,000,000 in shares of $100 each, one-fifth, or $7,000,000, to be subscribed by the Government. There were twenty-five directors, of whom five were to be appointed by the President of the United States. Ibid. p. 153.

President Jackson vetoed a bill to recharter the Bank in 1832 and in 1833 removed from the Bank all Government deposits. The charter of the Bank expired in 1836. Ibid. p. 157.

It appears, therefore, that for the period from 1791 to 1836 (excluding a period of five years—1811 to 1816) the Federal government not only chartered two national

banks but was a stockholder in both of them. The power to incorporate banks under acts of Congress was then seriously challenged, but now such power is clearly established. The power of the Federal government to become a shareholder in a bank chartered under its laws, admitting the power to so charter a bank, does not appear to have then been seriously challenged, but today the State of Maryland, though conceding to the Federal government the power to incorporate a national bank, denies that the ownership by the Federal government of shares of stock of such bank so incorporated under its laws is the exercise by the Federal government of a governmental function.

The facts of the case of *McCulloch v. Maryland,* 4 Wheat. 316 will for convenience be briefly stated.

An action of debt was brought by one John James for himself, as well as for the State of Maryland, against McCulloch, cashier of the branch bank of the United States located at Baltimore, to recover certain penalties imposed pursuant to an Act of the General Assembly of Maryland, imposing a tax on all notes issued by banks or branches thereof in the State of Maryland where such banks were not chartered by the Legislature of Maryland. McCulloch did not pay the tax on the ground that the Act of the General Assembly of Maryland was repugnant to the Constitution of the United States and the Act of Congress incorporating the Bank of the United States. The case was tried upon an agreed statement of facts in a county court of Baltimore County, which found for the State of Maryland. The Court of Appeals of Maryland affirmed this judgment, and the cause was brought to the Supreme Court of the United States on Writ of Error.

Extracts from the opinion of Chief Justice Marshall, which appear to us to be particularly pertinent to the issue here under discussion, are as follows:

At page 405 it was said:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all."

And at page 406:

> "Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described."

Again, at page 407, the Chief Justice said:

> "Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation', we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also

be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means."

The Court having then decided that the Act of Congress incorporating the bank was constitutional, next turned its inquiry to whether the State of Maryland may tax the branch of that bank located within its borders without violating the Constitution. The Court said, at page 426:

"This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

And at page 427:

"The power of Congress to create, and of course *to continue*, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable." (Italics ours.)

The Court, in concluding its opinion, said, at page 436:

"This opinion does not deprive the States of any resources which they originally possessed. It does

not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution."

In *Osborn v. U. S. Bank,* 9 Wheat. 738, the Court said, at page 861:

"Why is it that Congress can incorporate or create a Bank? This question was answered in the case of *McCulloch v. The State of Maryland.* It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government."

The Court then discussed the private functions of a bank, compared with its governmental functions, and said, at page 862:

"The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a Bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute."

And the Court said, further, at page 862:

"The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the gov-

> ernment are conducted. They are, therefore, inseparably connected with those transactions. They enable the Bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the Bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

The Chief Justice then asked whether each State possessed a right to control the operations of the banking business, which was essential to the operations of the government?

He answered and said:

> "The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative."

The Reconstruction Finance Corporation is a fiscal agent of the Federal Government and through its aid and assistance many banks were saved or strengthened, both prior and subsequent to the "general banking holiday" of March 1933, so that it may be truly said that the Reconstruction Finance Corporation was the chief Federal instrumentality in giving sustenance to and preserving the national bank system during its recent great crisis.

It would seem an extraordinary situation that the struggles of more than one hundred years ago, resulting in the recognition of the Federal Government's con-

stitutional right to incorporate a national bank free from taxation by the States, should today be nullified by the refusal to recognize the constitutional rights of the Federal Government to nurture and to continue the national banking system by subscription of Federal funds to the capital of such banks, without the imposition on such funds, when so invested, of taxes by the States.

To so hold would be to say at this late date that the Federal Government's acquisition of stock in the First and Second United States Banks was unconstitutional.

There is nothing in the cases relied upon by the Attorney General of Maryland which is not altogether distinguishable from the fact that the acquisition of national bank stock, by the Federal Government, is an exercise of a governmental function by it. Such cases all refer to taxation by the Federal Government of State enterprises, which this Court has held to be non-governmental.

Among these cases are the following:

South Carolina v. United States, 199 U. S. 437
Flint v. Stone Tracy Co., 220 U. S. 107
Metcalf v. Mitchell, 269 U. S. 514
Board of Trustees v. U. S., 289 U. S. 48, 59.
Ohio v. Helvering, 292 U. S. 360
Helvering v. Powers, 294 U. S. ; 55 Sup. Ct. R. 171
North Dakota v. Olson, 33 F (2) 848.

In *South Carolina v. United States,* supra, the State of South Carolina established dispensaries for the wholesale and retail sale of liquor and prohibited sale by other

than the dispensers. The United States demanded the license taxes prescribed by the Internal Revenue Act for dealers in intoxicating liquors. The dispensaries had no interest in the sales and received no profits therefrom, the entire profits being appropriated by the State. The taxes were paid under protest and the State of South Carolina brought suit in the Court of Claims to recover them. Judgment being for the United States, the State of South Carolina appealed.

Mr. Justice Brewer in delivering the opinion of the Court said at page 448:

> "Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself."

At page 452, the Court said:

> "The limitations on the powers of the States to tax national banks are founded upon the doctrines laid down in that case (McCulloch v. Maryland). So also the immunity of national property from state taxation. It is true that in most of the enabling acts for the admission of new States there is express provision that the property of the Nation shall be free from state taxation, but as shown by Mr. Justice Gray, delivering the opinion of the Court in *Van Brocklin v. Tennessee*, 117 U. S. 151, this provision is merely declaratory and unnecessary to establish the exemption of national property from state taxation."

In *Flint v. Stone Tracy Co.*, supra, the facts involved the constitutionality of the Corporation Tax Law, being

Section 38 of the Payne-Aldrich Tariff Act of August 5, 1909 which, briefly, imposed a special excise tax equivalent to one per cent upon the entire net income, with exceptions, of all corporations organized under the laws of the United States, or of any State, engaging in business in any State or territory of the United States. The Court, through Mr. Justice Day, said at page 152:

> "It is next contended that the attempted taxation is void because it levies a tax upon the exclusive right of a State to grant corporate franchises, because it taxes franchises which are the creation of the State in its sovereign right and authority. This proposition is rested upon the implied limitation upon the powers of National and State governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. It has been held in a number of cases that the State cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental functions of the United States. (Citing cases).
>
> "An examination of these cases will show that in each case where the tax was held invalid the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the Federal Government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers."

The Court at page 158 said:

> "But this limitation (on the right of the Federal Government to tax the governmental functions of a State) has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the States. We, therefore, reach the

> conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a State in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges."

In the case of *Metcalf v. Mitchell*, supra, the question was whether the income derived by consulting engineers employed to advise States was subject to Federal income tax. The suit was in the District Court of Massachusetts and came directly therefrom by writ of error on the constitutional question.

The Court found that the consulting engineers took no oath of office, were free to accept any other concurrent employment, that their engagements were not for work of a permanent or continuous character and that in reality they were not employees, but occupied the position of independent contractors. The Court said, through Mr. Justice Stone at page 521, in holding such income liable to income tax:

> "We pass to the more difficult question whether Congress had the constitutional power to impose the tax in question, and this must be answered by ascertaining whether its effect is such as to bring it within the purview of those decisions holding that the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the power of the states to tax the instrumentalities of the federal government." (Citing cases).

The Court then reviewed the decisions as to State taxation on Federal instrumentalities and said at page 522:

> "Just what instrumentalities of either a state or the federal government are exempt from taxation

by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other."

The Court then said at page 523:

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. (Citing cases).

"In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each

with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina v. United States,* 199 U. S. 437, 461; *Flint v. Stone Tracy Co.,* supra, at 172) or the appropriate exercise of the functions of the government affected by it.

"While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

In the case of *Board of Trustees v. U. S.,* supra, the University of Illinois imported scientific apparatus for use in one of its educational departments. Customs duties were exacted, which were paid under protest. The Customs Court decided in favor of the Government, which decision was affirmed by the Court of Customs and Patent Appeals. The case then came to the Supreme Court on certiorari. In affirming the judgment of the lower Court and in finding it unnecessary to pass upon the contentions of the petitioner that the articles imported were for a governmental function and therefore were not taxable, the Court, through Mr. Chief Justice Hughes, said at page 59:

"The control of importation does not rest with the State but with the Congress. In international relations and with respect to foreign intercourse and trade the people of the United States act through a

> single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the federal power has been exerted."

In the case of *Ohio v. Helvering,* supra, the question was whether where a State engaged in the business of distributing and selling liquor, it was immune from the Federal tax imposed upon liquor dealers. The case arose from a motion by the State of Ohio for leave to file a bill of complaint invoking the original jurisdiction of the Supreme Court. The motion was denied.

The facts in this case were similar to the facts in the case of *South Carolina v. United States,* supra, except for the fact that in the *Ohio v. Helvering* case the employees of the liquor dealers were Civil Service employees of the State.

Mr. Justice Sutherland, in delivering the opinion of the Court, said at page 368:

> "But, by the very terms of the rule, the immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress."

It is interesting to note that in the South Carolina case there were dissents of three Justices, whereas in the Ohio case there was no dissent.

In *Helvering v. Powers,* supra, the question was whether the compensation of members of the Board of

Trustees of the Boston Elevated Railway Company was exempt from the imposition of a Federal income tax. The Legislature of Massachusetts had provided for the public operation of the Boston Elevated Railway Company for a period of five years. Mr. Chief Justice Hughes, in delivering the opinion of the Court, said at page 173:

> "We come then to the question whether the Congress has the constitutional power to impose an income tax upon the compensation of public officers of the character here involved. We do not regard that question as answered by mere terminology. The roots of the constitutional restriction strike deeper than that. The term 'public office' undoubtedly implies a definite assignment of public activity, fixed by appointment, tenure and duties. But whether that field of activity, in relation to a state, carries immunity from Federal taxation is a question which compels consideration of the nature of the activity, apart from the mere creation of offices for conducting it, and of the fundamental reason for denying federal authority to tax. That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. (Citing cases). The principle of immunity thus has inherent limitations. (Citing cases). And one of these limitations is that the state cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the state has power to undertake such enterprises, and that they are undertaken for what the state conceives to be the public benefit, does not establish immunity. (Citing cases). The necessary protection of the independence of the state government is not deemed to go so far."

The Court also said at page 174:

> "We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the state, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the state. If, in the instant case, the commonwealth had acquired the property of the company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct operation by the commonwealth, there would appear to be no ground, under the principles established by decisions we have cited, for holding that this would affect the withdrawal of the enterprise from the federal taxing power. And the fact that the state has here undertaken public management and operation for a limited time, and under the particular restrictions of the agreement with the company, cannot be said to furnish a ground for immunity."

In *North Dakota v. Olson,* supra, decided by the Circuit Court of Appeals for the Eighth Circuit, the facts were as follows: The Constitution of North Dakota was amended so as to give the State the right to engage in any industry, enterprise or business, with certain exceptions not pertinent here. Pursuant to the amendment, the Bank of North Dakota was created in 1919 under the laws of North Dakota. The Bank was to be operated, managed and controlled by the Industrial Commission which was composed of the Governor, the Attorney General and the Commissioner of Agriculture and Labor.

The question was whether the Bank, as a State instrumentality, was exempt from the Federal capital

stock tax. The Court held that the Bank of North Dakota, while an instrumentality of the State, is one created by the State to engage in carrying on business of a private character and accordingly is taxable. The Court held at page 853:

> "Furthermore, there is no limitation on the power of the state of North Dakota to engage in private business, and if the bank is exempt from federal taxation the way is open for the state of North Dakota to relieve its citizens from all Federal excise taxes. It was such a dangerous consequence which the Supreme Court sensed in South Carolina v. U. S., and which no doubt had a controlling influence upon the decision of the court in that case."

The Attorney General of Maryland contends from the above group of cases that because the States have acquired certain properties or created certain agencies, which have been held by this Court to be taxable by the Federal Government since they were non-governmental enterprises, the converse of this proposition is true; and he therefore reasons that the property acquired by the Federal Government in the instant case, through the Reconstruction Finance Corporation, is not an exercise of a governmental function by the Federal Government and hence such property is taxable by the States.

This is the crux of the respondent's argument; but it is erroneous for it overlooks the fact that the property acquired in this case is stock of a national bank and that the power to create, sustain and preserve national banks, by subscriptions to stock or otherwise, is incidental to the power conferred upon the Federal Government by the Constitution to issue and control the currency, and has been held the exercise of a governmental function of the United States since the First United States Bank was in-

corporated in 1791, and since this Court passed upon the creation and preservation of its successor, the Second United States Bank, in 1819.

The Court of Appeals of Maryland also fell into error in its opinion in the instant case, upon the same mistaken theory. It held in substance that all activities of sovereignties, national as well as state, are not confined to the performance of governmental functions (R. 30), and that the Federal Government, in aiding Baltimore National Bank by its subscription, through the Reconstruction Finance Corporation, to the bank's preferred stock, has placed itself in the position of a partner in the bank's business and is taxable on the bank's shares as such (R. 34).

It might be answered that the Federal Government, unlike the states, is one of enumerated powers and that therefore whatever the Federal Government does, so long as it has the power or it is constitutional, it performs a governmental function. So while the States, in many cases, may constitutionally engage in a proprietory enterprise, the Federal Government lacks the power to do so.

No question has been raised as to the constitutional power of the Federal Government to become the owner of shares of stock of a national bank and in fact the Court of Appeals of Maryland assumed that the Federal Government had such power (R. 26). Nor could such question very well now be raised, either as to the ownership by the Federal Government of stock of national banks, in view of the fact that the Federal Government was a stockholder in both the First and Second United States Banks; or, as to the creation by the Federal Government of the Reconstruction Finance Corporation as a fiscal agent of

the Federal Government, because that question has already been decided by this Court in the case of *Smith v. Kansas City Title & Trust Company*, 255 U. S. 180, in which it was held that the creation of Federal Land Banks, as fiscal agents of the Federal Government, was constitutional.

But we do not rely on this answer alone. We contend that as to the acquisition of stock by the Federal Government, that such is an exercise by it of a governmental function, for the reason set forth above; and, as to the validity of the formation and operations of the Reconstruction Finance Corporation, we assert that they are not in issue in this case, for the reasons given above. We further desire to point out that the Reconstruction Finance Corporation is in no sense an experimental agency and was in fact created under one Federal administration and has been retained by the present administration; that it is generally conceded to be a highly effective and convenient instrumentality for the exercise of governmental powers and that it is, in the strictest sense, an arm of the Federal Government for the execution of certain functions which can best be carried out through the flexibility of the corporate form.

Moreover, by no stretch of the imagination, can any of its operations, much less the functions in this case, be regarded as primarily an effort of the United States to enter private business and derive profit therefrom. While every effort is made to continue its operations without a loss (to be borne by the payers of Federal taxes) its whole purpose, as well as its performance, has been designed to stabilize and strengthen, especially in this case, the national banking structure which, as said above, is a specific exercise of a governmental function. In this

case, for instance, the revenue derived from holding the stock of the Baltimore National Bank is completely subordinated to the true motive for the acquisition of the stock, which is plainly to assist and strengthen a national bank, part of a system which lies at the heart of the integrity and even the preservation of the Government itself. When one contrasts this vital function with the operation of the State liquor stores, of a street railway, or a state bank, it becomes abundantly clear that the Reconstruction Finance Corporation is set distinctly apart from such incidental, even trivial, exercises of power of a sovereign.

D.

The Tax Here Asserted, Directly Burdens the Exercise of a Governmental Function of the United States.

No state may tax the Federal Government or its instrumentalities in the exercise of a governmental function no matter how slight the burden may be. The question is not one of quantity of the tax but one of quality of the tax. If it is a tax upon the property of the Government or upon a governmental function it is invalid. If it is not a tax upon the property of the Government nor upon a governmental function, but upon some private person, corporation or independent contractor who has undertaken something for the Government, then, and only then, will the question of the quantity of the tax come into consideration and then, and only then, will the Courts look to see whether such tax indirectly or incidentally burdens the Government in carrying out its governmental function.

In the case of *Johnson v. Maryland*, 254 U. S. 51, an employee of the Post Office Department, while engaged in driving a Government motor truck over a post road

in the performance of his official duty, was arrested in Maryland, tried, convicted and fined for so driving without having obtained a license from the State of Maryland. The judgment was reversed by this Court.

Mr. Justice Holmes, in delivering the opinion of the Court, said:

> "Here the question is whether the State can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. *Farmers & Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, 525, 526. A little later the scope of the proposition as then understood was indicated in *Osborn v. Bank of the United States*, 9 Wheat. 738, 867. 'Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days, the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not 'subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority.' *Ohio v. Thomas*, 173 U. S. 276, 283. It seems to us that the foregoing decisions establish the law governing this case."

In Fox Film Corporation v. Doyal, 286 U. S. 123, which was a case involving a privilege tax on a business of licensing copyrighted motion pictures measured by the gross receipts of royalties, Mr. Chief Justice Hughes, in delivering the opinion of the Court, said, at page 128:

> "Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson v. Maryland*, 254 U. S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of the Government.' "

Among the cases holding a corporation formed by the Federal Government to be exempt from taxes by the States are:

Clallam County v. U. S., 263 U. S. 341;
New Brunswick v. U. S., 276 U. S. 547;
U. S. Shipping Board, Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U. S. 415;
King County v. U. S. etc. Fleet Corp., 282 Fed. 950.

In the Clallam County case the United States Spruce Corporation was formed under the general authority of Congress to expedite the production and purchase of aircraft material during the period of the World War. A corporation was accordingly organized under the laws of the State of Washington. The capital stock (except directors' qualifying shares), was all owned by the United States, and such bonds as were issued were taken by the United States and all interest and dividend payments went to the United States.

The United States brought suit in the United States District Court to cancel taxes levied by Clallam County

and the State of Washington upon the land and other physical property to which the United States Spruce Corporation then held legal title. A decree was had for the United States in the District Court, and after appeal to the Circuit Court of Appeals for the Ninth Circuit, that Court certified to the United States Supreme Court the question as to whether property held by the Spruce Production Corporation was subject to State taxation. Mr. Justice Holmes in delivering the opinion of the Court said:

> "The immunity is claimed under the Constitution of the United States. It is true that no specific words forbid the tax, but the prohibition established by McCulloch v. Maryland was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words. * * * This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. It is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States. *Van Brocklin v. Tennessee,* 117 U. S. 151."

The Court concluded by saying that it was too plain for further argument that the tax could not be imposed.

The force of this opinion is greatly increased when it is considered that in the Spruce Corporation case the corporation was a creature of the State of Washington,

while the Reconstruction Finance Corporation is chartered directly by Congress as a national instrumentality. Both corporations were organized exclusively for public purposes—the Spruce Corporation to expedite the production of war material, and the Reconstruction Finance Corporation to afford assistance to distressed and demoralized financial institutions, banks etc.

The case of *Lee v. Osceola Improvement District,* 268 U. S. 643, is an illustration of the immunity which attaches to property of the Federal Government, which immunity is jealously preserved. In that case the lands involved in the suit, known as "lake lands or sunk lands", were included in certain improvements in the District in question and the benefits accruing therefrom were assessed against all the property owners. It was discovered before the completion of the improvements that the United States was the owner of these lake lands and no attempt was, therefore, made to collect from it any part of the assessed benefits. After the improvements had been completed, the United States conveyed these lands to the Osceola Improvement Company. Later the taxing authorities of the District caused a reassessment to be made of the benefits accruing throughout the District, including the land formerly owned by the United States and sought to collect taxes from the new owner. The question was whether the Arkansas statute under which the tax in question was assessed, as construed and applied, deprived the land owner of his property without due process of law. This Court said at page 645:

> "It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a State so long as title remains in the United States. *Van Brocklin v. State of Tennessee,* 117 U. S. 151, 180. This is conceded."

The Court further decided that this exemption existed while the property was owned by the United States, even though it afterwards parted with its title, that the provisions of the Arkansas statute which reassessed the benefits which were put on the property while owned by the United States and attempted to be passed on to a subsequent owner was beyond the constitutional authority of the State and that there was no power to impose such a tax.

There are many cases holding that a tax is so remote as to have only an incidental effect upon a governmental function and such taxes have uniformly been held to be valid. In each and every case, however, it is submitted that the tax has not been upon the Government itself or upon its property or upon an instrumentality or arm of the Government itself, but always upon some private person or corporation engaged in such undertaking for profit, in short, upon an independent contractor engaged in a business enterprise for profit, which enterprise incidentally involved work for the Government.

Among such cases are:

Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375;
Susquehanna Power Co. v. State Tax Commission, 283 U. S. 291;
Fox Film Corporation v. Doyal, 286 U. S. 123;
Broad River Power Co. v. Query, 288 U. S. 178;
Federal Compress Co. v. McLean, 291 U. S. 17;
Trinity Farm Construction Co. v. Grosjean, 291 U. S. 466.

In the case of *Baltimore Shipbuilding Co. v. Baltimore*, supra, the land in question formerly belonged to the United States, being part of the property known as "Fort McHenry" and was admitted not to have been taxable at that time. The land was conveyed by Act of Congress to the Shipbuilding Company, the terms being that the Shipbuilding Company should construct a dry dock upon the land and accord to the United States the right to use forever the dry dock free from charge for docking, and that if such property should be diverted to any other use it should revert to the United States. After the conveyance the property was assessed for taxes by the Appeal Tax Court of Baltimore. The Shipbuilding Company alleged that its land was not subject to taxation, but the lower court held the land liable, and its judgment was affirmed by the Court of Appeals of Maryland. The case then came to the Supreme Court on writ of error. The Court, through Mr. Justice Holmes, affirmed the judgment of the Court of Appeals of Maryland on the ground that the United States had no present right to the land but merely a personal claim against the corporation, reinforced by a condition, and that it seemed to the Court extravagant to say "that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate form, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In the case of *Susquehanna Power Co. v. State Tax Commission*, supra, the Power Company was a licensee of the Federal Power Commission, and acting thereunder constructed a dam across the Susquehanna River and established an adjacent power plant within the State of Maryland. The State Tax Commission assessed the

Power Company's land, which lay under the pool created by the dam. The Court of Appeals of Maryland sustained the assessment and the case came to the Supreme Court on appeal. The Supreme Court affirmed the judgment of the Court of Appeals of Maryland, and the Court, speaking through Mr. Justice Stone, said that the Power Company was a business corporation, operating its power plant for profit, and that the challenged tax was not imposed on the license but on the private property of the licensee used in its business.

The Court further said that even assuming that the license of the Power Commission is a Federal instrumentality, immune from taxation or other direct interference by the State, yet it did not follow that the property which the Power Company uses in its power project was clothed with that immunity. The Court further said:

> "With that end in view, the distinction has long been taken between a privilege or franchise granted by the Government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage."

It is also to be noted that in this case the Power Company relied chiefly on the case of *Long v. Rockwood*, 277 U. S. 142, which was subsequently overruled in the case of *Fox Film Corporation v. Doyal*, supra.

In the case of *Fox Film Corporation v. Doyal*, supra, it was held that copyrights are not Federal instrumentalities and that the income derived from them was not immune from State taxation. The opinion was by Mr. Chief Justice Hughes, and the case was an appeal from the Supreme Court of Georgia.

In the case of *Broad River Power Co. v. Query*, supra, it was held that a hydroelectric company which constructed and operated its plant by permission of the Federal Government, under the Federal Water Power Act, does not act as the agent of the Government in producing and selling electric power on its own account, and accordingly cannot claim exemption from a State tax on the power produced and sold, upon the ground that the tax interferes with a Federal function or burdens the Federal Government. This case was on appeal from the decrees of a three-judge court in the District Court of the United States for the Eastern District of South Carolina, dismissing bills to enjoin the collection of a State tax. Mr. Chief Justice Hughes delivered the opinion of the Court and said that it was apparent that the Power Company in generating and selling power was not acting as an agent for the Government though it acted with the Government's permission, and therefore received a privilege from the Government, though not a privilege to be exercised on behalf of the Government.

The Court said at page 180:

> "The tax is not upon the exertion of, and cannot be said to burden, any governmental function."

The Court further said at page 181:

> "Thus, the 'permissive grant' by the Federal Government to a telegraph company to use the military and post roads of the United States for its poles and wires 'did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State.' (Citing cases). The complainant is in no better position with respect to the tax here in question."

In the case of *Federal Compress Co. v. McLean*, supra, the State of Mississippi imposed a non-discriminatory tax upon the business of storing and compressing cotton. The Compress Company was licensed by the Secretary of Agriculture to conduct a warehouse for the storage of agricultural products under the provisions of the United States Warehouse Act. The Supreme Court of Mississippi affirmed a judgment in favor of the Tax Collector, and on appeal to the Supreme Court this judgment was affirmed in an opinion by Mr. Justice Stone. The Court said that the Compress Company's license did not confer upon it immunity from State taxation, for neither it nor its business was, by force of the license, converted into an agency or instrumentality of the Federal Government, that the Warehouse Act conferred upon the licensee a privilege, but that the licensee in the enjoyment of the privilege was engaged in its own behalf, not the Government's, in the conduct of a private business for profit. The Court further said:

> "The fact that the license is used also as a means of Government control of appellant's business does not call for a different conclusion. * * * The mere extension of control over a business by the National Government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

In the case of *Trinity Farm Construction Co. v. Grosjean*, supra, the Construction Company entered into a contract with the Federal Government for the construction of levees in aid of navigation of the Mississippi River, in the performance of which gasoline was used to supply power for machinery. The Court held that a State excise tax on the gasoline so used was not invalid as a tax on a means or instrumentality of the Federal Government, its effect, if any, upon the Government be-

ing inconsequential and remote. This was an appeal from a three-judge court in the Eastern District of Louisiana, which court dismissed a bill to enjoin the enforcement of the State taxes. Mr. Justice Butler delivered the opinion of the Court, and said at page 471:

> "Its (the principle of immunity) application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motocycle Co. v. United States,* 283 U. S. 570, 575, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them.
>
> "The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River, and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor."

The cases cited and referred to above may be compared with the case of *Federal Land Bank v. Crosland,* 261 U. S. 374, and will be found to be in no way inconsistent with it. In the former cases the tax was upon a private person or corporation engaged as an independent contractor by the Federal Government or licensed by the

Federal Government to pursue a privilege inuring to such person's or corporation's own profit, whereas in the latter case the Bank was an instrumentality of the Government.

The facts in the Federal Land Bank case were that a mortgage was executed to it and a recording officer of the State of Alabama refused to record the mortgage without exacting the statutory tax. The case came to the Supreme Court on error to a judgment of the Supreme Court of Alabama, which reversed a judgment of the State Circuit Court in mandamus requiring a State Recording Officer to record such mortgage without exacting the tax.

Mr. Justice Holmes, in delivering the opinion of the Court, said, at page 377:

> "On the other hand the Federal Farm Loan Act of July 17, 1916, c. 245, s. 26, provides that first mortgages executed to Federal Land Banks shall be deemed 'instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.' 39 Stat. 360, 380. The validity of this provision is not questioned. Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 207, 212. Of course therefore it must prevail over any inconsistent laws of a State."

It is true that the Federal Farm Loan Act referred to in the above case specifically exempted the mortgage from taxation just as in this case the Reconstruction Finance Corporation Act exempts from taxation its capital, surplus, etc., which exemption will be referred to later. But the case is of interest, nevertheless, as pointing out the distinction between an instrumentality of the Government

engaged in a governmental function and a licensee of the Federal Government engaged in business for his own profit, or an independent contractor undertaking work for the Government as a private business venture even though such work may be the carrying out for the Government work of an admittedly governmental function. In the former case a State tax on the instrumentality's property is invalid whereas in the latter case a State tax upon the property of the licensee or of the independent contractor is valid.

In the case of *Smith v. Kansas City Title Company,* 255 U. S. 180, referred to by Mr. Justice Holmes in the Federal Land Bank case, the constitutionality of the Act of Congress authorizing the creation of Federal Land Banks and Joint Stock Land Banks was at issue. Mr. Justice Day, in delivering the opinion of the Court, and after referring to the cases of *McCulloch v. Maryland* and *Osborn v. Bank,* and stating that the question of whether or not Congress might establish banks for national purposes, was no longer open, said, at Page 209:

> "That the formation of the bank was required in the judgment of the Congress for the fiscal operations of the Government, was a principal consideration upon which Chief Justice Marshall rested the authority to create the bank; and for that purpose being an appropriate measure in the judgment of the Congress, it was held not to be within the authority of the court to question the conclusion reached by the legislative branch of the Government."

It is respectfully submitted, for the reasons given above, that the acquisition of shares of stock of the Petitioner by Reconstruction Finance Corporation was and is the exercise of a governmental function of the United States by an appropriate instrumentality thereof, and that accordingly, without more, such stock is not subject

to taxation by the State of Maryland. It therefore only remains to consider the pertinent Federal Statutes to ascertain whether or not they alter the aforegoing conclusions.

II.

THE PERTINENT STATUTES OF THE UNITED STATES ASSERT AND DO NOT WAIVE THE IMMUNITY OF THE FEDERAL GOVERNMENT FROM TAXATION BY THE STATES.

1.

The National Bank Act.

By an act passed February 25, 1863, Congress provided for the creation and organization of National Banking Associations, 12 Stat. at Large 668. This act contained no provision concerning State taxation of the shares of national banks. It was amended and re-enacted on June 3rd, 1864, and under Section 41 thereof allowed the States to tax shares of national banks, under certain clear and definitely prescribed conditions. This Section of the act is perhaps more frequently referred to as Section 5219 of the Revised Statutes of the United States, now U. S. C. A., Title 12, Section 548 Cumulative Annual Pocket Part, 1934, p. 107. This Section traces its origin to Section 41 of the Act of June 3, 1864, c. 106, 13 Stat. 99, 112. It was amended by Act of February 10, 1868, c. 7, 15 Stat. 34; again by the Act of March 4, 1923, c. 267, 42 Stat. 1499; and finally by the Act of March 25, 1926, c. 88, 44 Stat. 223. These amendments are unimportant for the purposes of this case except as to their historic sequence.

In a brief form for the purpose of this case Section 5219 is as follows:

> "STATE TAXATION. The Legislature of each State may determine and direct, subject to the pro-

visions of this Section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or * * *, provided the following conditions are complied with:

1. (a) the imposition by any State of any one of the above four forms of taxation shall be in lieu of others, except * * *.

2. The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any sub-division thereof, to the same extent, according to its value, as other real property is taxed."

Pursuant to such Congressional assent the Legislature of Maryland enacted what are now codified as Section 6, sub-section 6, Section 10, sub-section (b).(1), and Section 15, all of Article 81 of the Annotated Code of Maryland, 1929 Supplement, which have been previously set forth in this brief. In substance, they provide that the shares of stock of national banks are subject to assessment by the State Tax Commission and taxation to the *owner* of such shares. Such taxes are debts of the owner, but the bank is bound to pay them for its stockholders, as if the bank were the ultimate taxpayer, and may reimburse itself from the stockholders. This is the "share method" or "original method", contemplated by Rev. Stat. Sec. 5219 when it was first enacted in 1864, of taxing shares of national bank stock to the owners of such shares as personal property.

There is an exemption, however, set out in the Maryland law, *Bagby's Annotated Code of Maryland,* 1929 Supp., Article 81, Sec. 7, Sub-section (22), providing as follows:

> "(22) Any property exempted from taxation by this State by the Constitution of the United States or by any Act of Congress passed pursuant to and in conformity with the Constitution of the United States."

In regard to the latter exemption, however, as the Court of Appeals has said in the instant case, this provision of the Maryland Code only refers the question to the Federal Law (R 27).

The Respondent contends that Congress has consented to the taxation of shares of stock of national banks, and in particular the shares of stock involved in this case, and cites in support of its contention Section 5219.

The Petitioner on the other hand denies that Section 5219 has any such significance and contends that though Congress has assented to the taxation by the States of shares of stock of national banks, there is no assent, express or implied, to such taxation where the shares of the national bank assessed for taxation are owned by and are the property of the Government of the United States, or an arm or department thereof, and that in fact taxation has been expressly prohibited by Sec. 10 of the Reconstruction Finance Corporation Act, which will be discussed under the next heading in this brief.

From Section 5219 two things are apparent (a) *the tax must be upon the shares as property of the owner of such shares* and not upon the bank; and (b) there is not a single word in this Section which alters the funda-

mental proposition that property of the United States of America is not taxable by the individual State.

(a) The Supreme Court of the United States has held that the States may tax only the shares of stock in the hands of the shareholders, and in addition the real property of the national banks to the bank itself, which is the only right given under the Act to tax any of the property of a national bank as such, and that any tax in excess of or not in strict conformity with such Congressional permission is absolutely void. *Owensboro National Bank v. Owensboro,* 173 U. S. 664; *First National Bank v. Albright,* 208 U. S. 548; *Des Moines National Bank v. Fairweather,* 263 U. S. 103; *State of Minnesota v. First National Bank of St. Paul,* 273 U. S. 561.

Moreover, in *First National Bank v. Adams,* 258 U. S. 362, it was held that a tax against a national bank measured by the value of the bank's capital, surplus, undivided profits and other personal property, is not the equivalent of a tax upon the shareholders in respect to the shares owned by them, and is therefore altogether invalid, and that such tax, that is, one against the shares, becomes valid only when they are valued and assessed as the property of the owner of the shares as held by such owner.

These cases mean, insofar as they apply to the case at bar, that the taxes sought to be imposed here by the Respondent must be imposed, if at all, upon the Reconstruction Finance Corporation as owner of the preferred shares of stock of the Petitioner, and that if the tax sought to be imposed is imposed upon the Petitioner, then the tax is in excess of, and not in conformity with, the express Congressional assent, and is consequently ab-

solutely void and of no effect. The Petitioner is the mere agent of the owner for the purpose of returning the shares and paying the tax thereon for such owner, and the owner in this case is an arm, branch or department of the Federal Government, which is not subject to tax.

(b) It therefore being clear that the tax permitted to be levied by the States must be a tax on the owner, if such tax is to be levied at all, where does one find the consent of the United States of America to pay taxes levied on its property where, as in this case, the United States is the owner of such property?

Certainly there is no express authorization in Section 5219.

But the Attorney General of Maryland argues that in Section 51(d) of the National Bank Act, U. S. C. A., Title 12, Cumulative Annual Pocket Part 1934, page 18, (See Appendix "A") which authorizes the Reconstruction Finance Corporation to subscribe for preferred stock of national banking associations, there is no specific exemption set out in that section that such stock so purchased shall be exempt from State taxation. Why should such an exemption have been repeated in the Act above mentioned when the exemption set out in the Reconstruction Finance Corporation Act itself, enacted by Congress prior to the passage of this Act, (51(d)), was clear and comprehensive upon the subject of exemption from taxation of the property of Reconstruction Finance Corporation, providing "the Corporation, including its franchise, its capital, reserves and surplus, and the income shall be exempt from all taxation now or hereafter imposed by the United States * * * or any State", etc. (except its real estate), Reconstruction Finance Corporation Act, U. S. C. A. Title 15, Sec. 610.

The consent of the United States cannot be implied in Section 5219 since a statute allowing taxation of any class of property otherwise exempt is strictly permissive, and in its nature and effect must be narrowly construed. *Van Allen v. Assessors,* 3 Wallace 573.

Nor can it be argued that the earlier general statute (Section 5219), enacted in 1864 and last amended in 1926, removing to a certain extent the disability of States to tax stock of national banks in the hands of the owners can be incorporated *sub silentio* as an exception to the exemption from taxation, enacted in 1932, granted to all capital, reserves and surplus of the Reconstruction Finance Corporation, except real estate. By settled cannons of construction, the later and more specific statute governs rather than the earlier and more general.

In the only adjudicated cases, other than the instant case upon the issue involved in this case, it has been held that preferred stock of national banks, of which the Reconstruction Finance Corporation is the owner, is exempt from State taxation. See *United States of America and Reconstruction Finance Corporation v. State Tax Commission of Kentucky,* 10 Fed. Supp. 471; and *In Re Opinion of Justices,* 177 Atl. 897.

Therefore upon the plain language of the Act itself, upon the principles of statutory construction, from the history of the statute and from the adjudicated cases, it is respectfully submitted that there is no Congressional assent, express or implied, to taxation by the States of shares of stock of a national bank where such shares are the property of the Federal Government or an arm or department thereof.

We are aware of the cases cited by the Attorney General of Maryland in his opinion to the State Tax Com-

mission (R. 15), namely, *National Bank of Redemption v. Boston,* 125 U. S. 60; *Bank of California v. Richardson,* 248 U. S. 476; and *Bank of California v. Roberts,* 248 U. S. 497. These cases hold that shares of national bank A held by national bank B are taxable by the States in the hands of national bank B as the owner thereof.

There is a vast difference between permitting the States to tax shares of national bank stock held by another national bank, which bank is in its major features a private corporation engaged in the banking business for profit, and permitting the States to tax shares of a national bank held by Reconstruction Finance Corporation, which is an arm or department of the Federal Government, entirely owned and controlled by the Federal Government and not in business for profit, and therefore in reality owned by the people of the United States collectively and not by a special or private group or corporation.

The Attorney General of Maryland makes much of that part of the opinion of National Bank Redemption v. Boston, supra, in which Mr. Justice Matthews said that the States might tax "all the shares of its (national bank's) capital stock *without regard to their ownership.*"

This is a broad and sweeping statement. It, however, is a dictum, and is not the law. Next it is perfectly obvious that Mr. Justice Matthews had no thought whatsoever of the United States as the owner of national bank shares. This case was decided in 1888, more than fifty years after the charter of the 2nd U. S. Bank had expired and with it the ownership of the United States of shares of national banks. It also was decided very shortly after the case of *Mercantile Bank v. New York,* 121 U. S. 138, 154 in which it was said: "The capital of

each of the banks in this system was to be furnished entirely by private individuals." Comment hardly seems necessary.

However, whatever construction may be placed upon the dictum in the National Bank of Redemption case, we have here in the instant case a new Federal statute which expressly says that property of any kind, except real estate, owned by Reconstruction Finance Corporation, cannot be taxed. No question of construction of the earlier general statute discussed in the Bank of Redemption case, supra. can possibly remain. As heretofore stated, the most recent and specific mandate of Congress governs.

2.

The Reconstruction Finance Corporation Act.

Chapter 8, Sec. 10 of the Act of Congress of January 22, 1932, 47 Stat. 9; U. S. C. A. Title 15, Section 610, 1934 Cumulative Annual Pocket Part, page 86 of the Reconstruction Finance Corporation Act provides:

> "*Obligations of corporation; exemption from taxation.* Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, or by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county,

municipal, or local taxation to the same extent according to its value as other real property is taxed."

The exact part of said Section applicable to the present issue reads as follows:

> "The Corporation, including its franchise, its capital, reserves, and surplus and its income, shall be exempt from taxation now or hereafter imposed by the United States * * * or by any state, county, municipality, or local taxing authority; except that any real property of the Corporation shall be subject to * * * taxation * * *."

Accordingly the entire issue of Petitioner's preferred stock, which was subscribed to and purchased by the Reconstruction Finance Corporation, in accordance with the provisions of the Acts of Congress of March 9, 1933, Chapter 1, Sec. 304, 48 Stat. 6, as amended March 24, 1933, Chapter 8, Sec. 2, 48 Stat. 20; U. S. C. A. Title 12, Section 51-D, 1934 Cumulative Annual Pocket Part, page 18, (also set forth in Appendix "A."), thereupon became, and is now, an asset of Reconstruction Finance Corporation, and forms a part of its capital, reserves, or surplus which is specifically exempted from taxation by Section 10 of the Reconstruction Finance Corporation Act set forth above.

Section 10 is so clear and explicit that there is no need to apply to it the rules of statutory construction. The act speaks for itself. By making the sole exception in favor of the State as to taxation of real estate belonging to Reconstruction Finance Corporation, Congress made it clear that all other property owned by the Corporation was to be exempt from taxation. This surely must include property like national bank shares made taxable by Congressional indulgence along with prop-

erty generally taxable without such indulgence. The fact that later in authorizing Reconstruction Finance Corporation to purchase stock, exemption is not mentioned has no significance. Congress has already exempted all property of the Corporation, except real estate—it was not required to speak again.

In *United States of America and Reconstruction Finance Corporation v. State Tax Commission of Kentucky*, supra, the Court said:

> "Congress has passed no Act consenting that these shares of stock belonging to the Government and held by its agent, the Reconstruction Finance Corporation, may be taxed by State and local authorities. On the contrary, Section 10 of the Act creating the Reconstruction Finance Corporation (Section 610, Title 15, U. S. C. A.) expressly provides that none of the property of the Corporation, other than its real estate, shall be subject to taxation by the United States, or by the States, or any sub-division thereof. Such legislation was not necessary in order to exempt the shares of stock from taxation; but the fact that it was enacted establishes beyond all question that it was the intention of Congress that the property of this Corporation, other than its real estate, should be exempt from taxation; and that intention of Congress must be respected."

In *Thompson v. Pacific Railroad*, 9 Wallace 579, Mr. Justice Chase in delivering the opinion of the Court said at page 588:

> "We do not doubt, however, that upon the principles settled by that judgment, (*McCulloch vs. Maryland*) Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the

performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; *and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.*" (Italics ours.)

In the case of *Continental Ill. Natl. Bank & Trust Co. v. Chicago, etc. Ry. Co.*, 55 Supreme Ct. Reporter 595, 609, Mr. Justice Sutherland in delivering the opinion of the Court said:

> "The provisions and principles of enforcement of the Bankruptcy Act, including Section 77, are binding upon the Reconstruction Finance Corporation, *in the absence of some pertinent statutory exception*, as they are upon other corporations." (Italics ours).

The only reference which the Court of Appeals of Maryland makes to the specific exemption provided for by Section 10 of the Reconstruction Finance Corporation Act (R. 27) gives no meaning at all to it, but merely refers the question to the National Bank Act, which we have discussed in this brief under the next preceding heading.

Statutory exemptions similar to Section 10 of the Reconstruction Finance Corporation Act have been incorporated in the following Federal Acts: Federal Land Bank Act, July 17, 1916, c. 245, Sec. 26; 39 Stat. 380; U. S. C. A. Tit. 12, Sec. 931; War Finance Corporation Act, Apr. 5, 1918, c. 48, Sec. 16; 40 Stat. 511 U. S. C. A. Tit. 15, Sec. 344 (b); Federal Farm Mortgage Corporation Act, Jan. 31, 1934, c. 7, Sec. 12 (a); 48 Stat. 347; U. S. C. A. Tit. 12, Sec. 1020f.

The constitutionality of the Federal Land Bank Act was upheld in *Smith v. Kansas City Title & Trust Co.*, supra.

And in *Federal Land Bank of New Orleans v. Crosland,* supra, Mr. Justice Holmes held that the validity of the express Acts of Congress in exempting the property, in that case a first mortgage, from taxation, not being questioned, *Smith v. Kansas City Title & Trust Co.,* supra, that, of course, the exemption must prevail over any inconsistent laws of a State.

In *Federal Land Bank of St. Louis v. Priddy, Circuit Judge,* 55 Supreme Ct. Reporter, 705, Mr. Justice Stone in delivering the opinion of the Court said at page 708:

> "It is of some significance, also, that Congress thought it necessary, by the terms of section 26 (12 USCA, Sec. 931), to exempt federal land banks from taxation, a provision which is not made applicable to joint-stock land banks. There is thus a specific grant of immunity from taxation, to a corporation having its own purposes as well as those of the United States, and interested in profits on its own account (citing cases) in contrast to the legislative silence as to attachment and execution in suits to which the bank is liable. This affords additional evidence of the congressional judgment that the attachment and execution, as distinguished from liability to taxation, are not obstacles to the performance of the governmental functions committed to federal land banks. Had it been intended otherwise, it would seem to have been at least equally necessary to provide specifically for immunity from attachment and levy, as was done in section 10 of the Federal Railroad Control Act of 1918, c. 25, 40 Stat. 451, 456, which subjected rail carriers under federal control to liability to suit. Immunity of corporate government agencies from suit and judicial process, and their incidents, is less readily implied than immunity from taxation" (Cases cited).

Therefore, irrespective of the fundamental law, that the States may not tax the property of the Federal Gov-

ernment or an arm or department thereof, whether or not Congress has specifically exempted such property, nevertheless in this case Congress has acted and has specifically exempted the Reconstruction Finance Corporation and its property, save real estate, from taxation; and where Congress has acted, it is the law of the land which must prevail over any inconsistent laws of a State.

III.

CONCLUSION.

We have contended and, we believe, proved—

First, that a State may not tax the property or instrumentalities of the United States.

McCulloch v. Maryland, 4 Wheat. 316;
Osborn v. Bank of United States, 9 Wheat. 738, 867;
Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516, 525, 556;
Lee v. Osceola Improvement District, 268 U. S., 643, 645.

Second, that property of the United States may be held either by it directly or for it by an instrumentality, and Congress having chosen the instrumentality, it is not within the authority of a Court to question the conclusion reached by the Legislative Branch of the Government.

Clallam County v. United States, 263 U. S. 341;
Olson v. U. S. Spruce Corp., 267 U. S. 462;
Emergency Fleet Corp. v. Western Union, 275 U. S. 414;

New Brunswick v. United States, 276 U. S. 547;
Merchants Fleet Corp. v. Harwood, 281 U. S. 519;
Smith v. Kansas City Title Co. 255 U. S. 180 209

Third, that Reconstruction Finance Corporation is a corporation formed by Act of Congress, is by that Act a fiscal agent of the United States and is entirely owned by the United States and its profits or losses must ultimately accrue to or be borne by the United States solely. And accordingly all property which the Reconstruction Finance Corporation holds is in reality the property of the United States.

Smith v. Kansas City Title Co. 255 U. S. 180, 209;
Clallam County v. United States, 263 U. S. 341;
United States et al v. State Tax Commission of Kentucky, 10 Fed. Supp. 471, 474;
Reconstruction Finance Corporation v. Krauss, 12 Fed. Supp. 44.

Fourth, that there is nothing novel in the United States becoming the owner of shares of national bank stock. In 1791 it became the owner of one-fifth of the capital stock of the First Bank of the United States. In 1816 it became the owner of two-fifths of the capital stock of the Second Bank of the United States.

Fifth, that where an immunity from taxation exists at all, it is absolute, based on an entire absence of power to tax; and therefore any tax by the State of Maryland in this case directly burdens both the property of the United

States and the operation of an instrumentality of the United States and is accordingly invalid.

McCulloch v. Maryland, 4 Wheat. 316;
Osborn v. Bank of United States, 9 Wheat. 738, 867;
Johnson v. Maryland, 254 U. S. 51;
Clallam County v. United States, 263 U. S. 341;
Fox Film Corp. v. Doyal, 286 U. S. 123, 128.

Sixth, that pursuant to Rev. Stat., Sec. 5219, Maryland, which has elected the "original method" or "share method" of taxation of national banks, may not impose any other form of tax upon the shareholders or upon the bank itself (other than a tax upon the bank upon its real estate); and the tax here sought to be imposed therefore cannot be sustained as a tax upon the bank itself.

Owensboro National Bank v. Owensboro, 173 U. S. 664;
First National Bank v. Albright, 208 U. S. 548;
Des Moines National Bank v. Fairweather, 263 U. S. 103;
Minnesota v. First National Bank of St. Paul, 273 U. S. 561.

Seventh, that the Congressional assent to taxation by the States granted by a Rev. Stat. of Sec. 5219, even apart from the later exemption from taxation prescribed by Section 10 of the Reconstruction Finance Corporation Act, does not operate to waive the restriction implicit in the Constitution of the United States that the property of the United States is not subject to taxation by the States; and consequently that where the United States, or any entity acting on its behalf, is the owner of shares of stock

of a national bank, the stock so owned is immune from taxation by the States.

McCulloch v. Maryland, 4 *Wheat.* 316, 436;
Federal Land Bank of New Orleans v. Crosland, 261 U. S. 374;
United States et al. v. Lewis, 10 Fed. Supp. 471;
In re Opinion of the Justices, 177 Atl. 897.

Eighth, that by Section 10 of the Reconstruction Finance Corporation Act, which is subsequent in point of time to the latest amendment of Rev. Stat. Sec. 5219, and which makes the taxation of real estate belonging to Reconstruction Finance Corporation the sole exception in favor of taxation by the States, Congress has made it clear that any and all other property owned by Reconstruction Finance Corporation is exempt from taxation by the States. And such exemption must, of course, prevail over any inconsistent laws of a State.

Thompson v. Pacific Railroad, 9 Wallace 579, 588;
Smith v. Kansas City Title Co., 255 U. S. 180, 209
Federal Land Bank of New Orleans v. Crosland, 261 U. S. 374;
Federal Land Bank of St. Louis v. Priddy, 55 Supreme Ct. Rep. 705.

The property involved in this case belonging to the United States and sought to be taxed by the State of Maryland is, therefore, not only exempt from taxation by the restrictions implied in the Constitution, but is also expressly exempt from taxation by Congressional man-

date. It is impossible to conceive of anything more that Congress could have done to express the fact that the shares of national bank stock sought to be taxed are exempt from taxation.

It is therefore respectfully submitted that the Court of Appeals of Maryland erred in giving judgment for the State Tax Commission of Maryland, Respondent in this case, and that the judgment of the Court of Appeals of Maryland accordingly should be reversed.

Respectfully submitted,

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GAYLORD LEE CLARK,

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Baltimore National Bank.

APPENDIX A.

Amendment National Banking Act, March 9, 1933, c. 1, Sec. 304, 48 Stat. 6, as amended March 24, 1934, c. 8, Sec. 2, 48 Stat. 20. U. S. C. A. 12 51(d) Cumulative Annual Pocket 1934, p. 18:

"Sec. 51d. *Preferred stock; subscription by Reconstruction Finance Corporation; sale of stock.* If in the opinion of the Secretary of the Treasury any national banking association or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company, or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request. Nothing in this section shall be construed to authorize the Reconstruction Finance Corporation to subscribe for preferred stock in any State bank or trust company if under the laws of the State in which said State bank or trust company is located the holders of such preferred stock are not exempt from double liability. In any case in which under the laws of the State in which it is located a State bank or trust company is not permitted to issue preferred stock exempt from double liability, or if such laws permit such issue of preferred stock only by unanimous consent of stockholders, the Reconstruction Finance Corporation is authorized, for the purposes of this section, to purchase the legally issued capital notes or debentures of such State bank or trust company. The Reconstruction Finance Corporation may, with the approval of the Secretary of the Treasury, and under such rules and regulations as he may prescribe, sell in the open market the whole or any part of the preferred stock, capital notes, or debentures of any

national banking association, State bank or trust company acquired by the corporation pursuant to this section. The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this section. As used in this section, the term 'State bank or trust company' shall include other banking corporations engaged in the business of industrial banking and under the supervision of State banking departments or of the Comptroller of the Currency."